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Supreme Court of the United States

OCTOBER TERM, 1902.

No. 247.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY, PETITIONERS,

against

W. N. COLER & CO., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

BRIEF FOR PETITIONERS.

A. C. AVERY, *Counsel for Petitioners.*

THIS CASE BELONGS TO ONE OF THE CLASSES IN WHICH THE COURT HAS ANNOUNCED THAT IT WILL EXERCISE ITS PLENARY POWER BY GRANTING WRITS OF CERTIORARI TO THE CIRCUIT COURTS OF APPEAL.

"We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in *certiorari* ex-

tends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that court, and, further, that while this power is co-extensive with all possible necessities and sufficient to secure this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and *only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflicts between two or more courts of appeal, or between courts of appeal and the court of a State, or some matter affecting the interest of this Nation in its internal or external relations, demands such exercise.*

"Among the considerations thus suggested are those which *indicate why, in this case, the court properly exercised its power and issued the writ of certiorari. There was a conflict between the decision of the circuit court of appeals for the seventh circuit and the supreme court of the State of Indiana.* The latter court had declared that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal, and, therefore, that the territory was to be considered by all the officers of the State of Indiana as within the territorial limits of the city. The United States circuit court of appeals, by its decision in this case, had declared that such annexation proceedings were invalid, and that the property of the petitioner was not within the city limits. This tract of plaintiff's was not on the extreme limit of lands sought to be incorporated into the city, and, if the decision of the circuit court of appeals was enforced, there would be a tract of a few hundred acres within the exterior boundaries of the city of Hammond, as defined by the judgment of the supreme court of the State, withdrawn from the city jurisdiction, and, in fact, excepted from its territorial limits. *All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for certiorari was made, and, although no final decree had been en-*

tered, it seemed to us a duty to bring the case and question here for examination at the earliest possible moment."

Forsyth *v.* Hammond, 166 U. S., 506, 514, 515.

It will be seen by reference to pages 71, 72, 96, and 97 of the printed Record that the judgment affirmed by the supreme court of North Carolina in Commissioners *v.* Call, 123 N. C., 308, 327, is in conflict with the judgment of the circuit court for the western district of North Carolina affirmed by the decision of the circuit court of appeals for the fourth circuit, at Richmond, February 4, 1902. (See printed Record, page 123.)

Petitioners are advised that it is sufficient, upon the hearing of the preliminary motion, to show that the case referred to in the petition belongs to a class in which the court has declared its purpose to exercise its plenary power by reviewing the conflicting decisions and determining what is the law.

The two courts whose differences have given rise to this conflict, being courts of last resort, whose decisions, as a rule, must be followed, the petitioners take it for granted that so grave a question will not be considered by the court which is the final arbiter without a full discussion upon the merits. They will therefore submit a short brief to show that the issues of law raised have, at every stage of their consideration in different courts, and upon every question involved, given rise to conflict of opinion between learned and distinguished jurists, and that these differences, according to the settled practice of the court, should be reviewed only after hearing counsel for both parties and after due deliberation.

The agreement (pages 94 and 95 of printed Record) does not affect the question whether such conflict of opinion has arisen.

A part of the agreement referred to is as follows, to wit:

"It is further admitted and agreed between counsel that it may appear as a part of the record on appeal that an action was brought by Jessie M. Douglas and others as plaintiffs against The Northwestern North Carolina Railroad Company and others as defendants, returnable to the superior court of Guilford county at the June term 1888, for the purpose of preventing and restraining the Northwestern North Carolina Railroad Company from issuing mortgage bonds constituting a lien upon the completed road of said company to *and* in the extension of its line.

"3rd. That when the franchise and property of the Northwestern North Carolina Railroad Company was offered for sale under a decree of foreclosure made by the circuit court of the United States by the special master named in said decree at Winston, in the year 1894, R. M. Douglas, the justice who delivered the opinion of the court contained in said transcript was present and for and on behalf of his wife, as a stockholder, forbade said sale in writing, and appeared before the circuit judge and opposed the granting of the decree confirming said sale."

It will appear at a glance that the litigation referred to in the statement embodied in the agreement at the instance of counsel for the appellees involved the question whether certain mortgage bonds should be issued by the Northwestern North Carolina Railroad Company, and not the question whether a county should pay for capital stock in that company with its bonds. The appellants insist that there is no force in the contention of counsel for appellees in the circuit court (which led to the embodiment of the foregoing extract

in the agreement) that the facts therein stated affected in any way the opinion of the court in Commissioners *v.* Call, 123 N. C., 308, 327.

THE HISTORY OF THESE CONFLICTS OF OPINION.

FIRST. The bonds were declared invalid, and the Code, sections 1996 to 2000, was declared by the supreme court of North Carolina insufficient to authorize their issue (four justices concurring and but one dissenting), in *Commissioners v. Snuggs*, 121 N. C., 394.

SECOND. The circuit court of appeals reviewed the opinion of the circuit court of the western district of North Carolina, declaring the bonds valid, and (all of the judges, Goff, Morris, and Brawley, concurring) reversed the ruling of the circuit court and followed that of the supreme court of North Carolina.

Commissioners *v.* Coler, 96 Fed. Rep., 284.

THIRD. Upon petition to rehear, filed in the court of appeals, the mandate was stayed and the cause was held to await the decision of the Supreme Court upon the hearing on certificate in Wilkes County *v.* Coler, 180 U. S., 506–524, but the court declined to pass upon the question whether Wilkes county (or Stanley county) was empowered by sections 1996 to 2000 of the Code of North Carolina to issue bonds in aid of railroads extending through their counties, because that did not appear to be one of the questions certified.

FOURTH. It had been held to be the duty of the circuit court of appeals to follow the construction given to section 14, article II, of the constitution by the State court, and one

of the remaining questions is whether the Federal courts should follow the construction given by the State tribunal to sections 1996 to 2000 of the Code.

FIFTH. A bare majority, composed of Judges Morris and Boyd, decided to overrule the former decision of the court of appeals, while Judge Goff dissented. (See opinions in the printed Record, at page 110 *et seq.*)

The established rule of the Federal courts is to resolve all reasonable doubts in favor of the construction placed by the State tribunals upon their own statutes.

"The construction by the courts of a State of its constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the supreme court of a State has misconstrued its constitution or its statutes, but we are not at liberty therefore to set aside its judgments. That court is the final arbiter as to such questions. In Claiborne County *v.* Brooks, 111 U. S., 400, 410 (28—470, 474), it was said: 'It is undoubtedly a question of local policy with each State, what shall be the extent and *character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States;* for it is a question that relates to the internal constitution of the body politic of the State.' (See also Burgess *v.* Seligman, 107 U. S., 20, 33; Butcher *v.* Cheshire R. Co., 125 U. S., 555; Detroit *v.* Osborne, 133 U. S., 492; South Branch Lumber Co. *v.* Ott, 142 U. S., 622; Kaukauna Water Power Co. *v.* Green Bay and M. Canal Co., 142 U. S., 254; McElvaine *v.* Brush, 142 U. S., 155; Stutsman County *v.* Wallace, 142 U. S., 293, quoting Norton *v.* Shelby County, 118 U. S., 425, and Gromley *v.* Clark, 134 U. S., 338; Morley *v.* Lake Shore M. S. R. Co., 146 U. S., 162; Bauserman *v.*

Blount, 147 U. S., 647; May *v.* Teney, 148 U. S., 60; Baltimore and O. R. Co. *v.* Baugh, 149 U. S., 368, 373; Lewis *v.* Monson, 151 U. S., 545; Baikam *v.* Woodstock Iron Co., 154 U. S., 177, quoting Leffingwell *v.* Warren, 67 U. S., 2 Black., 599, 603.)"

Where it is found that no construction had been given to a statute by the State court, when the transaction was entered into, the Federal courts "*will lean toward an agreement of views with the State courts, if the question seems to them balanced with doubt.*"

Burgess *v.* Seligman, 107 U. S., 17, 38.

It is true that all courts incline to hold commercial paper, in the hands of innocent purchasers for value, valid, but nowhere, except in the concurring opinion of Judge Boyd and in the brief of Mr. Price, have we found an intimation that in order to uphold municipal bonds, "if it can do so under any circumstances" or "if it is possible to do so," a Federal court must lean against instead of in favor of a ruling by a State tribunal that the creation of a debt by a municipality was *ultra vires*. Justice Gray, in Louisville R. Co. *v.* Louisville Trust Co., 174 U. S., 573, 574, said, quoting 10 Wall., 604:

"Where a party deals with a corporation in good faith, *the transaction is not ultra vires, and he is unaware of any defect in authority*, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists."

THE CONTENTION OF THE PETITIONERS IS THAT THE AUTHORITY TO SUBSCRIBE WAS LIMITED TO A CERTAIN CLASS OF COUNTIES. IF A COUNTY WAS NOT A DONEE OF SUCH POWER BY REASON OF BELONGING TO SUCH CLASS, IT COULD NOT CONFER SUCH AUTHORITY ON ITSELF BY RECITATIONS EITHER IN BONDS OR IN THE MINUTES OF ITS GOVERNING OFFICIALS.

If the legislature had not intended to restrict the power of "the boards of commissioners of the several counties" to aid railroads to those in which the citizens of the county may have an interest, it would have *omitted the qualifying clause "when necessary to aid in the completion of a road in which the citizens of the county may have an interest,"* and have allowed any county to subscribe stock "to any railroad company or companies." The qualifying words are surplusage, according to the construction of the circuit court of appeals.

If the clause descriptive of the company to which the subscriptions might be made is not meaningless and mere surplusage, it confers power only on a certain class of counties. *If a county not authorized attempts to subscribe, it is acting ultra vires.* Whether there is anything in the transaction to excite suspicion or not, a purchaser is bound to look to the power of a municipality to issue bonds, and must lose when he buys bonds issued without legislative authority.

The language of Code, section 1996, relied upon as authority for the issue of the bonds, is as follows:

"*The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens may have an interest.*"

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What is meant by the words "any railroad in which the citizens of a county may have an interest"? The petitioners submit that the courts of America and the British Empire have uniformly construed the word "interest" in such connections to mean "pecuniary interest" in the thing referred to—here, in the railroad.

DEFINITION OF THE WORDS "INTEREST" OR "INTERESTED."

In construing a statute prohibiting any member of a council from having a direct or indirect interest in a contract of the corporation, the supreme court of Michigan, in Swedly *v.* Kirby, 79 N. W. R., 188, said:

"This indicates that a pecuniary interest was intended. Anderson defines interest as such relation to the matter in issue as creates a liability to pecuniary loss or gain from the event of a suit."

Taylor *v.* Highway Commissioners, 88 Ill., 527.
Northampton *v.* Smith, 11 Met. (Mass.), 395.

In a case where the question was whether a salaried employé of a firm of contractors was interested in the contracts of the firm, the Pennsylvania court said:

"The word interested does not mean anything but pecuniary interest, and of this there is no evidence."

Dunlap *v.* Philadelphia, 13 W. N. C. (Pa.), 98.

The supreme court of Illinois, in passing upon the questions whether the State had an interest, within the meaning of the statute in a *quo warranto* proceeding to try title to an

office, said: "The interest which a State must have in such a cause is *a substantial interest as a pecuniary interest.*"

McGrath *v.* People, 100 Ill., 461.

In State *v.* R. Co., 36 N. J. L., 164, the court, drawing the distinction between estates and interest in a statute providing for condemnation of right of way, said:

"Under the more comprehensive term, 'persons interested,' are included not only persons in whom is vested the legal title which the company proposes to acquire, * * * but also other individuals having some independent right or interest therein, * * * such as an easement of a right of way, inchoate rights of dower or courtesy, or incumbrances, such as by judgments or mortgages, which are charges on the legal estate. The object is * * * that their interest may be extinguished by payment."

The supreme court of California, construing a statute allowing a party "beneficially interested" a writ of review of an order of the board of supervisors, granting a right to use a highway for the purpose of constructing a railroad, held that an affidavit alleging that "affiant, in common with others living along the highway, would be damaged," was insufficient, and said:

"It does not appear by the petition in this case that the *petitioner has any other or greater right in the highway mentioned therein than any other citizen of the State.* * * * In an application made by a private party, *his interest must be of a nature distinguishable from that of the mass of the community.*"

Linden *v.* Alameda County, 45 Cal., 7.

Ashe *v.* Colusa County, 71 Cal., 236.

If a person living on a highway has "*no other or greater interest therein than any other citizen of the State,*" *then a person living on or in the vicinity of an improved highway—a railroad—has no other or greater interest in the railroad* than any other citizen of the State, and the citizens of Wilkes county, whether they live along or away from the line of railway, "*have no other or further interest therein than any other citizen of the State.*"

ADDITIONAL AUTHORITIES CONSTRUING "INTEREST" AS MEANING A PECUNIARY, VALUABLE, OR BENEFICIAL INTEREST, NOT MERELY A PATRIOTIC OR SENTIMENTAL INTEREST WHICH A CITIZEN OF A STATE OR COUNTY FEELS IN A PUBLIC IMPROVEMENT.

As shareholders, by reason of a subscription already made, the citizens of the county would have an interest in any contract from which, as shareholders, they might derive profit, as by making an incomplete road more valuable by extension.

Todd *v.* Robinson, Q. B. D., 739.
Hunnings *v.* Williamson, 112 Q. B. D., 536.

"Beneficial interest" was construed to mean present, vested, or valuable interest by the supreme court of Massachusetts.

Dexter *v.* Cotting, 149 Mass., 92.

Interest in an estate or action, where requisite to give a person standing in court as a party to an action, is uni-

versally construed to be a beneficial, valuable, vested, or pecuniary interest.

Bachman *v.* Packard, Q. Fed. Cas., No. 709.
Northampton *v.* Smith, 11 Met. (Mass.), 395.
Goodall *v.* Tuttle, 10 Fed. Cas., No. 5533.
Whitney *v.* Brittain, 16 N. Y. App. Div., 457.
Hevin *v.* Valcano, etc., Co., 13 Ca., 62.
Bugher *v.* Gott, 3 N. Y. Supp., 518.
Whitney *v.* Barley, Q. B. D., 154.
Burgess *v.* Clark, 14 Q. B. D., 735.
Gasquet *v.* Johnson, 1 La., 431.

The interest which disqualifies a judge from sitting is held to be "a property interest" in the action and its results, not "the interest which he may have in common with other citizens in a public matter."

Sauls *v.* Freeman, 24 Fla., 209.
Chicago, etc., R. Co. *v.* Kellogg, *supra.*

The foregoing list of authorities might be enlarged by adding scores of cases in which the word interest is interpreted in the same way, but it is not deemed necessary to cite any but the following:

Taylor *v.* Norment, 88 Ill., 327.
Wilson *v.* Railroad, 37 Ala., 358, 360.
In re Estate of White, 37 Cal., 100.
Shelton *v.* Derby, 27 Conn., 415, 421, 425.
Smith *v.* Phillips, 62 Ala., 578.

"Interest" is defined in dictionaries, where it relates to property such as railroads, generally as a legal concern of a

person in a thing, or in the conduct of another person, whether it consist in the right of enjoyment of or benefit from property or right to claim an advantage, or be subjected to a liability on account of the conduct or management of property.

In other words, an interest is either a legal right in a thing, as property, or such a relation to it as to enable one to participate in the profits of its conduct or management, or share in the loss arising from its management.

One of the definitions given by the Standard Dictionary of "*interested*" is "*being a part owner; as one interested in railroad shares.*"

It is contended for the petitioners that the citizens of a county, collectively, could only be interested, in the ordinary and obvious meaning of the word as applied to railroads, where the corporation, which embodied all rights of the citizens as a body, has some interest in the shares of its stock. This definition is in harmony with the contention of the petitioners that the last clause of section 1996 is surplusage, unless it restricts the power to subscribe to roads in which the county may already own shares of stock.

The lexicons and law books uniformly define an interest in any kind of property in the same way. If the word has no technical meaning, then it must be interpreted according to its ordinary meaning.

Adams *v.* Turrentine, 30 N. C., 147.
Blue *v.* McDuffie, 44 N. C., 13.
Randall *v.* Railroad, 107 N. C., 748, 750.

Whatever rule of construction may be followed, the interpretation must be the same, and, seeing this, on the first

hearing, Judge Goff incorporated into the opinion the entire discussion of this point by the supreme court of North Carolina in Commissioners *v.* Snuggs, expressing briefly the approval of the court.

On the other hand, in the opinion delivered on February 4, 1902, in Commissioners of Stanly *v.* Coler & Company, the court assumes that the legislature did not mean "interest" in the sense of "pecuniary interest," because the qualifying word was inserted in the Constitution in reference to the State, but was omitted from the statute. The court said the words "in which a citizen of a county may have an interest" in a railroad would seem to be the appropriate words to express the general interest which the whole body of the people of a county have in a railroad which they believe will benefit them, as distinguished from direct pecuniary interest of the county as a corporation. This construction of the word by the court of appeals is in direct conflict with the authorities cited, and is not supported by a single reference to law book or lexicon. The construction of the State court is set aside without a discussion, because that court, following the overwhelming weight of authority, held that the word "pecuniary" could only intensify and emphasize the word "interest," and that the word "interest," in such a connection, was intended to denote pecuniary interest, and was, except for the purpose of emphasis, surplusage. *But half of section 1996 is declared surplusage by the court of appeals in order to lean against the construction of the State court.*

This opinion is remarkable in that it disposes of the ruling of a State court with so little ceremony, and in that, though overruling the construction given by the State court

to its own statute, it substituted its own interpretation without citing an authority to sustain its views. Indeed, no reason whatever is given for rejecting the definition of the court, though it would seem that the concensus of opinion in all courts has been that, when applied to property, an interest means a pecuniary interest; and no regret is expressed for disregarding the State's construction.

Was it not reasonable and proper that the supreme court of North Carolina should adopt the definition given both by law books and dictionaries, and should have added that such an interpretation of a statute enacted by the reconstruction legislature was in harmony with the policy of the reconstruction constitution? Of this, that court, having knowledge of the peculiar conditions in the State and its policy, as indicated by a comparison of its various laws and their interpretations, was certainly more competent to judge. (See discussion of policy, *post.*)

Judge Boyd, in the concurring opinion in Commissioners *v.* Coler, *supra*, declares it to be both the right and duty of the court of appeals to "construe the language of sections 1996–2000 according to their natural and proper meaning;" but he fails to refer to law books or lexicons from which that court gathered the "natural and proper meaning."

We challenge the respondents to produce authority of courts or scholars for such a definition of interest as applied to a railroad.

The statute requires the subscription must be "necessary to aid in the completion of any railroad," etc.

The petitioners respectfully insist that the word "COMPLETION" has also a most material bearing upon the ques-

tion of legislative authority—that is, in indicating the *class of counties* to which the act refers.

Judge Goff, in delivering the unanimous opinion of the circuit court of appeals, 96 Fed. R., *supra*:

"But did the sections above mentioned give additional and complete authority to order the elections, issue the bonds and levy the taxes to pay them, principal and interest? Section 1996 is in these words: 'The boards of commissioners of several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.' It will be necessary, in order that that section may be construed to give authority to the commissioners to issue the bonds, that the language should include a railroad not begun to be built before the constitution was adopted; that the word 'completion' should be construed 'building' or 'construction,' extending even to the building of a new road; for, in the case before us, it appears that the road had not begun to be built. We cannot see why the word 'completion' should be thought to have been used by the legislators in any other sense than the one most usual and natural. Ordinarily, the words 'to complete' are understood to mean 'to finish,' 'to fulfill,' and the word 'completion' to mean the 'finishing' or 'accomplishing in full' of something which has already been commenced; as, for instance, it is most frequent to hear the word 'completion' used in connection with the finishing years and months of the education of the young. The object of the statute must have been to provide, by general act, means by which the counties, without special legislation for each county by separate bills, might be enabled to complete unfinished railroads in which the counties had a pecuniary interest. At the time of enactment of the statute of 1868–'69, and always since that time, any county of the State, duly observing the limitations of section 7 of

article VII of the constitution, and under an act passed according to the requirements of section 14, article II, of the constitution, could, and can, subscribe to the capital stock of a railroad company, whether unfinished or to be begun. *The act of 1868–'69, however, considering the condition of the affairs then existing—that is, that there were counties which had a pecuniary interest in the railroads that had been begun, but unfinished—enabled such counties to make subscriptions of bonds to complete such unfinished roads at the earliest moment and with the least cost, by general law, passed according to section 14, article II, of the constitution.*"

THE LEGISLATURE OF NORTH CAROLINA INTENDED TO EMPOWER ONLY THOSE COUNTIES WHICH HAD ALREADY INVESTED IN THE STOCK OF A RAILROAD COMPANY, BUT HAD NOT THEREBY EFFECTED THE COMPLETION OF THE LINE TO MAKE AN ADDITIONAL SUBSCRIPTION TO THE STOCK.

Because, FIRST, any other construction would have allowed a subscription to be made by any county in the State, for the citizens of Wilkes county, by reason of vicinage, *had no other or greater interest "in the railroad than any other citizen of the State.*"

SECOND. According to all rules of construction, it must be assumed that the legislature intended to describe a class of counties, and limit the power to them, since it is an established rule that the courts must, if possible, give effect to all of the words of a statute, as the supreme court of North Carolina did; whereas the court of appeals found it necessary, in order to sustain the bonds, to construe the words of limitation as mere surplusage.

THIRD. It is an historical fact, alluded to in Galloway *v.* Chatham Railroad Co., 63 N. C., 147, and University *v.* Holden, 63 N. C., that counties, as well as the State, had been lending their credit and subscribing to the stock of railroad companies, and that section 14, article II, and section 7, article VII, of the constitution of 1868 had been inserted in that instrument to restrain counties from reckless expenditures of this kind, just as sections 1, 4, article VI, had been framed as a check upon extravagant legislation by the State. (See 63 N. C., page 147.)

FOURTH. Sections 1996 to 2000 of the Code were first enacted by the reconstruction legislature of 1868, which attempted to shape the statutory law so as to bring it into harmony with the constitution, and it is in harmony with the general policy of the State to construe the restrictive clause of section 1996 as conferring the authority to subscribe on counties already interested pecuniarily in the railroad to which they propose to subscribe, just as the legislature, in order to protect investments already made by the State, was empowered to subscribe to railroads in which the State had already become interested.

FIFTH. Section 3766 of the Code (enacted in 1868) provides that where statutes are re enacted "the portions not altered are to be considered as having been the law since their enactment; and at the time of their enactment."

Neither the Code, sections 1996 to 2000, nor the charter are sufficiently specific to comply with article V, sections 6 and 7, of the constitution.

In Commissioners of Buncombe County *v.* Payne (123 N. C.,

432, 488, decided December 8, 1898, a month after the opinion was filed in Commissioners *v.* Call, on November 9, 1898, and during the same term), the court said, at page 448:

"*A general act, authorizing any and all counties to issue bonds, would be invalid, especially when (as in the case here) it is necessary* to exceed the constitutional limitation *to pay interest or principal.* Tate *v.* Commissioners, 122 N. C., 812 (at page 815); Herring *v.* Dixon, *id.*, 420 (at page 124)."

In Commissioners of Wilkes *v.* Call, 123 N. C., 308 (at page 324), Justice Douglass said, in reference to the necessity for specific statutes:

"If the word 'uncompleted' can refer to any road not yet begun, and the word 'interest' apply to a mere friendly feeling or supposed advantage to be derived from the general building up of a country, then the several counties may go on *forever subscribing unlimited amounts to any railroad in esse or in futuro that may be located within the range of their knowledge. Such a construction would simply nullify the constitution by making its explicit restrictions vain and worthless. It cannot be adopted by us, but, if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books.* While the legislature may, in individual cases, grant to specific counties the necessary authority, in accordance with the provisions of the constitution and subject to its restrictions, *it cannot, by a sweeping act of unlimited application, utterly destroy its operation.* If the legislature or the railroad company or the county had placed any such construction on those sections, additional legislation would have been deemed useless, and the recitals in the bonds would have been different."

In short, the declaration of the State court is that the sections referred to, if susceptible of the construction placed

upon them by the circuit court of appeals, were in violation of the constitution (referring, of course, to article V, sections 6 and 7).

Article V, sections 6 and 7, are as follows:

"SEC. 6. *Taxes levied by county commissioners.*

"The taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, *except for a special purpose, and with the special approval of the General Assembly.*

"SEC. 7. *Acts levying taxes shall state object, etc.*

"*Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.*"

There is no finding as a fact in Commissioners *v.* Payne, *supra*, that the levy of a tax sufficient to meet the interest "or principal" at maturity would exceed the constitutional limit (of sixty-six and two-thirds cents on the hundred dollars in value of property taxed). But the court takes judicial cognizance of public law and reports of the auditor as to the assessed value of property and the amount of taxes imposed. Upon this information, which is within the reach of every citizen who can read as well as of the court, the court declared that it would be necessary to exceed the limit in order to pay interest and principal at maturity of the Buncombe debt.

For like reason Justice Douglass said, in Commissioners *v.* Call (123 N. C., page 324), in condemning the construction of the Code now adopted by the circuit court of appeals, which would allow all counties to subscribe "unlimited

amounts to any railroad *in esse* or *in futuro*, that may be located within the range of *their knowledge*," said:

"Such a construction would simply nullify the constitution *by making its explicit restrictions vain and worthless. It cannot be adopted by us, but if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books.*"

Judge Douglass was warranted in declaring, of his judicial knowledge, that it would be necessary for Wilkes county to exceed the constitutional limit. Were we to concede the soundness of the position taken by the court of appeals that it is not essential to levy a special tax "in the same bill," except when the tax will exceed the limit, then our position would be untenable under even that rule.

The construction placed by Justices Clark and Douglass, speaking for the court in the Buncombe and Wilkes cases, upon the State constitution finds support in older adjudications of the State court.

THE SETTLED LINE OF DECISIONS OF THE SUPREME COURT OF NORTH CAROLINA PRIOR TO OCTOBER 1, 1889, WHEN THE WILKES COUNTY BONDS WERE ISSUED, IS IN ACCORD WITH THE RULING IN COMMISSIONERS V. PAYNE, SUPRA, THAT A GENERAL ACT PURPORTING TO AUTHORIZE "ANY AND ALL COUNTIES TO ISSUE BONDS WOULD BE INVALID BECAUSE OF FAILURE TO PROVIDE FOR LEVYING A SPECIAL TAX."

In Galloway *v.* Chatham Railroad Company, 63 N. C. R., 151, 152 (decided at January term, 1869), the court held that there were two conditions upon which the State should be

allowed to contract a new debt before the bonds of the State should be at par (under a fair interpretation of article IV, section 5, of the constitution):

1st. Unless it (the legislature) shall, in the same bill, levy a special tax to pay the interest annually, and

2d. "Unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

The court held in that case that the meaning of the section is that "the General Assembly shall have no power to create new debt or pecuniary obligation (except in two specified cases), unless *a special tax be levied in the same bill to pay the interest.*"

Thirty years later Justice Clark, delivering the opinion of the court in Commissioners *v.* Payne, 123 N. C., at page 488, construed sections 6 and 7 of article V of the constitution of North Carolina, which is as follows:

"SECTION 7. Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other."

In connection with the prohibition in section 6 of article V, that the tax levied by the counties "shall never exceed the double of the State tax, except for a special purpose and with the special approval of the General Assembly."

Judge Clark declared, for the court, that neither the general provision of the Code, section 1999, nor the general provision of the charter of the Northwestern North Carolina Railroad Company, construed in connection with that of the

Atlantic and North Carolina Railroad Company, was sufficiently specified to confer authority on Wilkes county to subscribe or issue the bonds or levy the tax to meet the principal and interest of the bonds.

The provisions of the Code and of the charter referred to are as follows:

"SEC. 1996. The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies, when *necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.*"

"SEC. 1999. In case the county shall subscribe the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of eight per cent., when the interest on said bonds shall be payable, and at what place, and shall also fix the time and place of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds."

"SEC. 2000. The taxes authorized by the three preceding sections to be raised for the payment of interest or principal, shall be collected by the sheriff in like manner as to other State taxes, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this chapter."

SECTION 12 OF THE CHARTER (PAGE 54 OF THE PRINTED RECORD), SECTIONS 33 AND 36 OF THE CHARTER OF THE ATLANTIC AND NORTH CAROLINA RAILROAD (PAGES 54 AND 55 OF THE PRINTED RECORD).

"SEC. 12. *Be it further ordained*, That the stockholders of said company may pay the stock subscribed by them either

in money, labor, material for constructing said road, as the board of directors may determine, and that *all counties or towns subscribing stock to said company shall do so* in the same manner and under the same rules and regulations and restrictions as *are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.*"

Chapter 136 of the Laws of North Carolina, session 1852.

"SEC. 33. *Be it further enacted,* That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in *manner and form as hereinafter provided.*"

"SEC. 36. *Be it further enacted,* That for the purpose of paying the quotas on said stock as may be called for, or in the installments of such subscriptions as may fall due, the town authorities and the justices of the county shall have power to appoint an agent or agents to negotiate a loan or loans for and in the name of such town or county; and it shall be the duty of the authorities of such town and the justices of such county to levy such taxes annually on the persons, lands and other personal property within such town and county as may be sufficient to pay the amount of such loan or loans and the interest thereon, and as said town authorities and justices of such county shall deem necessary and proper, and to make such order or orders as shall be deemed necessary for the due collection and payment of the same; and the stock subscribed on behalf of such town and county shall stand pledged for the payment of the loan thus authorized to be contracted."

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The constitution of North Carolina provides as follows:

"ARTICLE II, SEC. 21. The style of the acts shall be: *The General Assembly of North Carolina do enact.*"

The supreme court of North Carolina, in State *v.* Patterson, 98 N. C., 660, 661, 662, 665, 666 (decided September, 1887, two years before the bonds were issued), held that a statute in all other respects in the form prescribed, but without the prescribed enacting clause, was void.

The court declared all of the requirements of the constitution to be mandatory, using, at pages 661, 662, the following language:

"It (the constitution) is not to be disregarded, ignored or suspended, or broken, in whole or in part, nor can any officer, or a co-ordinate branch of the government, supply, superadd or assume power and authority not conferred by it. In this latter respect, it expressly provides that 'all powers not herein delegated remain with the people.'

"More particularly, for the present purpose, when the constitution prescribes and directs in terms, or by necessary implication, that *a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular co-ordinate branch of government—as the legislature—or by a particular officer or class of officers, and prescribes the way and manner of doing it, such direction cannot be disregarded; a due observance of it is essential, because the constitution so provides, and its provisions are not in vain or of trifling moment. It is not of the nature of constitutions of government to provide non-essentials—useless, unimportant details—such as may be disregarded and dispensed with.* As we have said, they are organic—made upon solemn consideration by the sovereign authority, and contain general, essential provisions—details are avoided, unless deemed important—essential.

"The answer to these and like questions must be, that re-

quirements of the constitution shall prevail and be observed; and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. Such act cannot be complete—such a thing is not effectual—until done in the way and manner so prescribed" (Wilkes County Commissioners *v.* Coler, 180 U. S., 506, 521).

Justice Clark in Commissioners v. Payne, 123 N. C., at page 488, construed the command contained in the latter half of section 6, and in section 7, of the constitution according to the rule laid down in State v. Patterson, supra, two years before the bonds were issued in 1889, to wit, in September term, 1887. Justice Douglas followed the same rule when he declared that the provisions of the charter and the sections of the code had no place on the statute book, if susceptible of the interpretation that they gave the same general authority to other counties as was given to Forsyth county.

By reference to Bank *v.* Commissioners, 116 N. C., 339, and Bank *v.* Commissioners, 119 N. C., 214, it becomes apparent that the court of appeals drew an inference from the two opinions that was unwarranted. The controversy was as to the validity of a subscription by the town of Oxford to a railroad company, which was chartered to build a railroad connecting the town of Oxford with the coast line, just as the ordinance of 1868 authorized the connection of Winston-Salem, in Forsyth county, intersecting by a line with the North Carolina road somewhere from Greensboro to Lexington. The town of Oxford was designated as the initial point of the proposed road, and the sufficiency of the authority was questioned in the first case (see 116 N. C., 363), because

the legislature had failed to provide in the charter itself the machinery for holding the election, and the court decided that the general acts providing for holding such elections furnished the necessary authority as to the manner of holding them and counting votes; but it was not till the question was raised on the second appeal (119 N. C., 214) that the supreme court of North Carolina ever considered whether the authority to create the debt, *even with the approval of the voters of the town*, had been granted by the legislature, and, then, apart from the question of estoppel, the discussion, on the argument and in the opinion of the court, was directed to the new evidence showing that the statute relied on as authority for issuing the bonds was not enacted in accordance with the requirements of article II, section 14, of the constitution.

It is a significant fact that the act of 1868 (Code, secs. 1996 to 2000) was not referred to by Justice Bynum in the opinion in Belo v. Commissioners, nor by counsel in the argument of that case, though the action was brought by Mr. McCorkle, former reporter and one of the ablest lawyers in the State, and though the case was decided eight years after the passage of the act of 1868–'9.

THE CASES OF HERRING v. DIXON, 122 N. C., 420, AND TATE v. COMMISSIONERS, 122 N. C., 812, SUSTAINED JUDGE CLARK'S POSITION AS TO THE INSUFFICIENCY OF STATUTES PURPORTING TO CONFER GENERAL AUTHORITY ON COUNTIES TO CREATE DEBTS EXCEPT FOR NECESSARY EXPENSES.

It will be observed that the act construed in Herring v. Dixon, *supra*, conferred certain powers on three counties specifically named in the act, to wit, Green, Wilson, and

Wayne, and that the statute construed in Tate *v.* Commissioners, *supra*, named Haywood county as the donee of certain power.

No power to Wilkes county is written in the charter by the reference to the other charter, because—

1st. It is a familiar and elementary rule of construction that grants of powers to municipal corporations by a sovereign State are construed strictly, both as to the designation of the donees of the powers and the nature and extent of the authority granted.

2d. It is not pretended that there is any grant of power in the charter itself to any county to subscribe except that contained in section 12, *supra*, to wit, "*all counties or towns subscribing stock to said company shall do so in the same manner* and under the same rules, regulations, and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company for the government of such towns and counties *as are now allowed to subscribe to the capital stock of said company.*" This designates no county, either by name *or* "*writing into*" the sections referred to. The counties that do subscribe under the ordinance of 1868 must "do so in the same manner and under the same rules and regulations and restrictions as are prescribed" in the other charter. The provisions of chapter 136, Laws of 1852, "*are written into*" *the ordinance for the purpose of furnishing a method of proceeding in submitting the question of subscription to the people and making a subscription after voting.*

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3d. It is a forced construction which interprets a reference to the "rules, regulations, and restrictions" imposed in another charter "for the government of such towns and counties as are allowed to subscribe to the capital stock of said company as a grant of power to all such counties as lie near the line of the new company, because "all counties near or through which" the line of the older company passed were permitted by express grant of form to subscribe to the company building it. This is a claim that the power to subscribe is given to Wilkes county by implication arising out of the charter. Judge Douglas, in Commissioners v. Call, 123 N. C., at page 316, meets that suggestion as follows:

"But corporate powers can never be *created by implication nor extended by construction.* No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in manner too plain to be misunderstood. When the State means to clothe a corporate body with a portion of her sovereignty and to disarm herself to that extent of powers which belong to her it is so easy to say that we will never believe it to be meant when it is not said; and words of unequivocal import are so easily inserted by mistake or fraud, that every consideration of justice and policy requires that they shall be treated as nugatory, when they find their way into the enactments of the legislature. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference. This court has asserted it times without number. We have ruled five or six important cases upon it within the last year. We seem not to have

made much impression on the professional mind, and we are probably making little now. But when respectable counsel call upon us hereafter (as they doubtless will) to enlarge corporate powers by construction, we can only repeat again and again that our duty imperatively forbids it. The privileges of the Pennsylvania Railroad Company may be too rigidly restricted. If the usefulness of the company would be increased by extending them, let the legislature see to it; but let it be remembered that *nothing but plain English words will do it.*"

In Belo *v.* Commissioners (upon which the court of appeals rests its decision) we find (76 N. C., at page 493) the following:

"This rule, however, which subsists between individuals, is much modified in respect to *corporate bonds, such bonds can be issued only in pursuance of a special grant of power*, and the party claiming the benefit of such bonds must show power in the corporation to issue them."

4th. The court, in Call *v.* Commissioners, *supra*, at page 313, in discussing the effect of section 12, said:

"That said ordinance cannot be relied on to support the validity of the bonds at issue is apparent for several reasons: *First, we do not see that any authority whatever was given or attempted to be given by either of these sections to Wilkes county to subscribe to the capital stock of this company.*"

5th. The fact cannot be ignored that the court was influenced in Belo *v.* Commissioners (76 N. C., at pages 497, 498) by the expressed view that the act of August, 1868, "validated both the county subscriptions and the issue of bonds," as will appear from the following (see page 496):

"Declaring, as we do, that the ratifying act of August 1868, was a curative act, and validated both the county sub-

scription and the issue of the bonds, if any defects existed therein—and it has been one purpose of this opinion to show that the bonds were valid in the hands of *bona fide* holders without the aid of this healing act—*the proposed evidence of the defendant became immaterial and irrelevant.* As a matter of law, the bonds were valid, and the court did not err in so declaring."

It is significant that "*the proposed evidence of the defendant became immaterial*" *only in view of the ruling that the curative act of August, 1868, validated the subscription and bonds.* (See extract.) *It nowhere appears what the evidence was, but there can be no question that the defendant, Forsyth County, offered evidence which, but for the curative act, would have been material. The act of 1868 was then treated as a valid act.* Now, in the light of the evidence adduced, the Supreme Court of the United States has held that it is no law. The material evidence excluded, because immaterial on account of the treating the act of 1868 as valid, might have turned the scales, as it would have gone to the jury upon the issue submitted. It is important to recollect that, just after the declaration by the court (Belo *v.* Commissioners, 76 N. C., page 498) that "*the proposed evidence of the defendant became immaterial and irrelevant*" in view of the fact that the curative act validated the bonds, the court proceeds, as pertinent to that part of the discussion, to make the following statement:

"The only issue submitted to the jury was, 'Is the plaintiff the *bona fide* owner and for value of the bonds and coupons mentioned in the pleadings, and was he such at the commencement of the action'"?

The court below excluded the testimony offered by the defendant bearing upon the validity of the bonds, announc-

ing as "a matter of law that the bonds were valid," and refused to submit any issue as to the validity, and the Supreme Court sustained this ruling because the validity of a curative act, which, in the light of the evidence offered in this case, is no law, was not then questioned. (See 76 N. C., page 498.) Wilkes County *v.* Coler, 180 N. C., 506, 521. (See opinion, printed Record, page 112.)

IT MUST BE REMEMBERED THAT THE ACT OF 1868 WAS RATIFIED AUGUST 11, AFTER THE RATIFICATION OF THE CONSTITUTION ON APRIL 24, 1868. IF THE SUPPOSITION THAT THE ACT OF 1868 WAS VALID RENDERED IRRELEVANT AND INCOMPETENT TESTIMONY WHICH WOULD HAVE BEEN MATERIAL IN BIELO *v.* COMMISSIONERS, SUPRA, IT FOLLOWS THAT THE ORDINANCE OF 1868, ALONE, DID NOT INVEST WILKES COUNTY WITH AUTHORITY TO SUBSCRIBE TO THE STOCK OF THE COMPANY AND ISSUE BONDS IN PAYMENT OF SUCH SUBSCRIPTION.

See questions asked by the court (Wilkes County Commissioners *v.* Coler, 180 U. S., 532):

"WAS WILKES COUNTY IN THE SAME CATEGORY WITH FORSYTH COUNTY? WAS THE ROUTE OF THE ROAD NORTHWEST OF SALEM AND WINSTON TO SOME POINT IN THE NORTHWESTERN BOUNDARY LINE OF THE STATE TO BE DETERMINED BY THE LEGISLATURE OR BY THE COMPANY? IF BY THE LEGISLATURE, WAS THE ROUTE EVER DETERMINED OTHERWISE THAN BY THE ACT OF 1879, WHICH HAS BEEN ADJUDGED NEVER TO HAVE BECOME A LAW OF THE STATE?

"DID WILKES COUNTY HAVE AUTHORITY UNDER THE ORDINANCE OF 1868, ALONE, TO AID BY A SUBSCRIPTION OF STOCK AND BONDS THE CONSTRUCTION OF THE SECOND DIVISION OF THE ROAD REFERRED TO IN THE ACT OF 1879, EXTENDING

FROM THE TOWNS OF WINSTON AND SALEM, UP THE VALLEY OF THE YADKIN BY WAY OF JONESVILLE AND WILKESBORO, IN THE COUNTY OF WILKES, TO PATTERSON'S FACTORY IN THE COUNTY OF CALDWELL?"

Wilkes County Commissioners *v.* Coler, 180 U. S., at page 532.

Referring to the act of February, 1879 (printed Record, pages 14 to 16), the circuit court of appeals said, in the leading opinion (printed Record, page 116):

"The act of February 20, 1879, which is recited in the bonds as authority for issuing them, definitely located this road running into Wilkes county. It does it by enacting that the convention ordinance shall be amended by adding certain words, which make it read, when so amended, as follows (see section as amended, page 115).

"Section 2 of the act of February 20, 1879, provides for convict labor being furnished for the purpose of constructing this second division; and section 4 provides *for bond subscriptions by any county in the State.* This act was invalid so far as it attempted to give power to the counties to create a debt, because it was not passed as laws for that purpose are required by the constitution of North Carolina to be passed, but that invalidity does not affect the sections of the law which deal with other matters.

Rodman *v.* Washington, 122 N. C., 39 to 42.
Russell *v.* Ayers, 180–189.
Gambell *v.* McCrady, 75 N. C., 509.
Bank *v.* Commissioners, 119 N. C., 214.

"So far as now appears, the amendment locating the road into Wilkes county, *was validly passed and became a valid law of North Carolina.*"

The position upon which the court thus rests its opinion may be summarized as follows: The act of February 20,

1879, is unconstitutional because not passed in accordance with the requirements of article 2, section 14, of the constitution, in so far *as it attempts directly and in express language to authorize Wilkes county to issue bonds* in payment of its subscription. But though the direct authority purporting to be given is void, Judge Morris held that *the other provisions enacted in the same defective way accomplished by indirection the same end by simply locating a new branch of an old road.*

This proposition, if sustained as correct, effectually annuls section 14, article II, of the constitution, the interpretation of which by the State court has been declared binding upon the Supreme Court of the United States. Almost every old charter which authorized the building of a railroad before 1868 also in terms authorized the construction of branch roads, and this ruling of the circuit court of appeals would sanction any evasion of this plain prohibition of the constitution by amendments to them enacted without a roll-call, provided such amendments purported to modify the general description of the route marked out in the charter by adding a more specific description of a branch. This would be to follow the State's interpretation only far enough to provide ready means of evading it. The court cites several North Carolina cases to sustain this extraordinary conclusion. These decisions sustain the well-established principle that an act may be constitutional in part and unconstitutional in part, but we search in vain for sanction to the proposition that one part of an act may be void as authority to create a debt *because of the defective enactment of the whole act, while another section of the act so passed confers authority on a municipal corporation to create the same debt.*

It is true that in Rodman *v.* Washington the court held

the act of 1897 for the support of graded schools in Washington "unconstitutional and void, in so far as the same purports to authorize and empower the commissioners of the town of Washington to levy a tax for any such purpose as therein set out, for that the said bill was never read three several times in each house of the General Assembly," etc. But we search the opinion in vain for a ruling that some other provision of the same act enabled the town to evade the constitutional inhibition.

In Russell *v.* Ayers, 120 N. C., 180, the court held that the section of the revenue act of 1897 which was in violation of article V, section 1, of the constitution, in that it failed to observe the equation between property and polls, was void, and that the effect of this violation of the constitution was to leave in force the ratio between poll and property established by the statute in force when the act of 1897 was ratified, though the other provisions of the act of 1897 not in violation of the constitution must be enforced as valid. But we find in the opinion no intimation that this plain violation of the organic law could have been evaded by an artful draftsman. We find nothing in Bank *v.* Commissioners, 119 N. C., 214, to warrant the deduction that an act, invalid because of the manner of its enactment, in so far as it purports to confer authority upon a corporation by its expressed language, can be construed to confer the same authority by some reference in another section of an older statute.

The case of Gambell *v.* McCrady, 75 N. C., 509, sustains the general proposition that an act may be constitutional in part and may be unconstitutional in part, but nowhere lends its sanction to such an evasion of the organic law as seems to be approved by the circuit court of appeals.

IF THE LEGISLATURE ALONE HAD THE POWER TO LOCATE THE LINE OR LINES TO BE CONSTRUCTED WEST OF WINSTON-SALEM, AND SUCH LOCATION, BY VIRTUE OF A SIMPLE ENACTMENT, WAS TO BE CONSTRUED AS AUTHORITY TO A COUNTY TO CREATE A DEBT, THEN SUCH A STATUTE WAS IN VIOLATION OF ARTICLE II, SECTION 14, OF THE CONSTITUTION, AND VOID, IF NOT ENACTED AS THEREIN REQUIRED. THE LEGISLATURE CANNOT DO INDIRECTLY WHAT IT IS PROHIBITED FROM DOING DIRECTLY. THE CIRCUIT COURT OF APPEALS FAILED TO ADVERT TO VARIOUS AMENDMENTS TO THE CHARTER OF 1868, WHICH ARE REFERRED TO IN THE RECORD. AMONG THE ACTS SO OVERLOOKED IS THE ACT RATIFIED FEBRUARY 3, 1869 (ACTS OF 1868–'69, CHAPTER 62), ENTITLED "AN ACT TO REPEAL AN ACT ENTITLED AN ACT TO AMEND AN ORDINANCE OF THE CONVENTION ENTITLED AN ORDINANCE TO INCORPORATE THE NORTHWESTERN NORTH CAROLINA RAILROAD COMPANY, AND TO SUBSTITUTE THE FOLLOWING PROVISIONS FOR SAID ACT."

The second section of the last-named act provided for State aid to the first division of the road from Winston-Salem, for the Mount Airy division, and "for the purpose of aiding in the construction of the Yadkin Valley division of said railroad, running from Salem-Winston by way of Louisville, thence by way of Yadkinville, in the county of Yadkin, or within one and a half miles thereof." By this act it was provided that the State should loan the company twenty thousand dollars a mile to construct the road by way of Yadkinville. This act has never been repealed, in so far as it provides for a different route from Salem-Winston, westward. Some of the other acts referred to in the record and

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printed in the brief of counsel for appellant in the circuit court of appeals are the following, to wit:

Acts of 1869–'70, chapter 100.
Acts of 1870–'71, chapter 178.
Acts of 1871–'72, chapter 25.
Acts of 1871–'72, chapter 47.

The circuit court of appeals failed to examine thoroughly the decisions of the supreme court of North Carolina, as will appear from comparing extracts from its opinion with the decisions of the State court.

First. The circuit court of appeals said in the opinion (Record, page 117):

"Has the supreme court of North Carolina ever interpreted this amendment and declared its meaning? We do not find that it has."

In Commissioners *v.* Call, the majority opinion does not place the decision upon the contention that Wilkes county is not in the same category with Forsyth county, but upon a want of power affecting both alike, and upon the fact that an invalid enactment is recited on the face of the Wilkes County bonds as authority to issue them.

Compare the foregoing with the following, from Commissioners *v.* Call, 123 N. C., at page 313:

"That said ordinance cannot be relied on to support the validity of the bonds at issue is apparent for several reasons. *First, we do not see that any authority whatever is given, or attempted to be given, in either of these sections, to Wilkes county to subscribe to the capital stock of this company.*"

It thus appears that the State court rested its opinion, first of all, upon the ground *that no power was given to Wilkes county, not upon a want of power affecting Wilkes and Forsyth alike*, though it is true that the testimony offered by the defendant in the Belo case was excluded, and the supreme court of North Carolina sustained the ruling below, *because the act of August 11, 1868* (which, in the light of new evidence—extracts from the legislative journals—has been since declared void), *rendered that evidence irrelevant and immaterial.* The supreme court, in the extract given above, laid down at the outset the proposition that no authority had been granted to Wilkes county, not that both counties are in the same category. Thus the court of appeals misinterprets and, by inadvertence, mistakes the grounds upon which the opinion (in Commissioners *v.* Call) is made to rest.

Second. The opinion of the majority of the circuit court of appeals, in further support of the views that the act of February 20, 1879, vested authority in Wilkes county, said:

"The original charter ordinance of 1868, having given authority to construct a railroad by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the State, and to construct branches, and the legislature having afterwards validly enacted that one of these branches running towards the northwestern boundary line of the State, to be called the second division, should be constructed by way of Wilkes county, there would seem no sound reason for construing the legislation so as to deny to Wilkes county that power to issue bonds which the supreme court of North Carolina had in 1877 held that Forsyth county had."

As I have already attempted to show, the legislature could not evade the constitution by giving indirectly to a county power to create a debt when it was prohibited by article II, section 14, from doing so directly. *To declare the amendment of 1879 so far valid as to vest Wilkes county with authority to create a debt by marking out the route of the second division in section 1 of the act, though section 4* (printed Record, pages 14, 15) is to annul the constitution and evade the decisions of the highest courts—State and Federal courts.

Third. The circuit court of appeals said in effect that there is nothing in the decisions of the supreme court of the State to sustain the late statement of that court that it was the policy of the framers of the constitution of 1868 and of the legislature, which gave its provisions full effect, to restrict counties and other municipal corporations in creating debts. That court said:

"It is urged in argument that the policy of North Carolina was declared by the constitution of 1868 to be hostile to permitting counties to bond themselves in order to subscribe to railroads which passed near or through them. We do not think this anywhere appears."

In discussing the Code, sections 1996 to 2000, in Commissioners *v.* Snuggs, 121 N.C., at page 402, Justice Montgomery said, for the court:

"*It is most reasonable to conclude that the policy and purpose of both the constitutional provision and the statute were the same, the only difference being that in case of State aid no approval by a vote of the people was required, while a majority vote of the people was required in case of county aid.* The object of the statute must have been to provide by a *general act means by which the counties, without special* legislation for

each county by separate bills, might be *enabled to complete unfinished railroads in which the counties had a pecuniary interest.* At the time of the enactment of the statute 1868–'69, and always since that time, any county of the State, duly observing the limitations of section 7, art. VII, of the constitution, and under an act passed according to the requirements of section 14, art. II, of the constitution, could and can subscribe to the capital stock of a railroad company, whether unfinished or to be begun."

In support of the declaration of the court, which the circuit court of appeals say, "We do not think anywhere appears," we respectfully submit a portion of the opinion of Chief Justice Pearson, in University *v.* Holden, 63 N. C. (filed at June term, 1869), beginning at page 413:

"The evil which the constitution seeks to prevent is not that of giving aid to individuals or corporations in the construction of railroads, but that of contracting *new* debts on the part of the State, the existing debts being almost too heavy to bear, and the credit of the State tottering under the load. A construction by which new debts my be contracted on a larger scale than one expressly prohibited, is not admissible upon any principle of the law. As this is a deduction from Galloway *v.* Jenkins, in which the court was divided, *I will put my conclusions also on the construction of all the provisions of art. V.*"

III. The act under consideration is in violation of the constitution in this: The tax levied by it disturbs the proportion which, by the constitution, capitation tax must bear to the tax on the value of the property, to wit: "The *tax on a poll should be equal to the tax on three hundred dollars' worth of property.*" Here we have the proportion. Then follows a provision: "The State and county tax combined shall never

exceed *two dollars on the head*," and the necessary effect is that the State and county tax on the value of property shall never exceed two dollars on three hundred dollars' worth of property; and the effect also is that if the tax on a poll is less than two dollars, then the tax on three hundred dollars' worth of property must be less in the same ratio. In other words, the tax on the poll is "the standard" by which the tax on property is levied.

Under two dollars, the power to levy a poll tax for State purposes is unlimited; this interest needs no protection, for it has a full representation in the General Assembly.

Counties are protected by section 7, which provides:

"Taxes levied for county purposes shall be levied in like manner with the State taxes, and shall never exceed double of the State tax, except for a special purpose, and *with the special approval of the General Assembly*."

Cities, towns, and townships are protected by article VII, section 7, which provides:

"No debt shall be contracted, nor shall any tax be levied, except for necessary expenses, unless by a vote of a majority of the qualified voters therein."

The only remaining interest is that of *property-holders in respect* to State and county taxes. This interest is protected by the equation fixed between capitation tax and the tax on property. A statute which disturbs this equation breaks down the safeguard thrown around property by the constitution. If it can be done to the extent of one-hundredth of 1 per cent., it may be done to the extent of one-tenth, and there is no limit.

It was said in the argument that this equation applies only to taxes levied for current expenses of the State and counties, and has no reference to taxation necessary to pay interest on the public debt or the tax to be levied to pay the interest on any new debt.

1. I agree that if, under this equation, carried to its limits, the amount is not enough to meet current expenses and also to pay interest on the public debt, then for the excess needed it is not only within the power, but it is the duty of the General Assembly to disregard the equation, for this protection to property must be taken to be subject in the injunction "to maintain the honor and good faith of the State untarnished in regard to the public debt (art. I, sec. 6), and by section 4 of the article under consideration it is ordained:

"The General Assembly shall, *by appropriate legislation and adequate taxation*, provide for the payment of the interest on the public debt, and after 1880 it shall lay a special annual tax, as a sinking fund, to discharge the principal."

I do not adopt the entire position taken by Mr. Haywood, that a specific tax is meant as a tax on land by the act or on horses and cattle by the head. It is enough to admit that this tax is to be independent of the equation, as in *section 7 a tax for special county purposes, with the special approval of the General Assembly, may be levied without reference to the equation.*

I do not agree to the position that the tax required by article —, section 5, to be levied to pay the interest on any new debt, is not subject to equation, and that the powers to tax property *in reference to new debts are unlimited*, save by the

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discretion of the General Assembly. There is nothing, as we have seen there is, in the case in regard to taxation to meet the interest and principal of the existing debt, to take this taxation out of the equation. *Its being called a special tax cannot have the effect, for section 6 requires that every act shall state the special object to which the tax is applied. On the contrary, it is included in the equation by every rule of construction.*

This fixed equation between poll tax and property tax gives significance to the provisions of the first clause of section 5:

"No new debt shall be contracted in behalf of the State, *unless in the same bill a special tax is levied to pay the interest annually.*"

Compare the foregoing with the discussion in the same volume in Galloway *v.* Chatham Railroad Company, to which Chief Justice Pearson refers in the foregoing citation from University *v.* Holden, and it will appear that the court, in the two opinions, for the purpose of construction, discussed the provisions of article V of the constitution, and the question whether these provisions restricted the State or its governmental subdivisions.

In matters of construction, the court is not to confine itself to the particular section; but *it is to consider the entire instrument in order to find the general purpose and the object arrived at.*

"To maintain the honor and good faith of the State untarnished, the public debt regularly contracted before and since the rebellion shall be regarded as inviolable, and never to be questioned" (art. I, sec. 6).

"No law shall be passed to raise money on the credit of

the State, or to pledge the faith of the State directly or indirectly for the payment of any debt, etc., unless the bill is *read three times on three different days*, and unless the *yeas and nays on the second and third readings of the bill shall have been entered on the journal*" (art. II, sec. 16).

"*The General Assembly shall, by appropriate legislation, and by adequate taxation, provide for the prompt and regular payment of the interest on the public debt, and, after the year 1880, it shall lay a specific annual tax upon the real and personal property of the State, and the sum thus realized shall be set apart as a sinking fund, to be devoted to the payment of the public debt*" (art. V, sec. 4).

But the court is also required to look at the previous legislation by which the evil calling for these cumulative restrictions was caused, and this will furnish a key to the meaning, and open it so plainly to view "that he who runs may read."

"The war debt has been put out of the way by a dash of the pen. It will be found that most of the public debt was incurred in three modes: *First, by subscribing for stock in railroad and navigation companies, and issuing bonds to pay for the stock, the State becoming a member of the corporation; this is the heaviest item, and amounts to, say eight millions of dollars; second, by issuing bonds of the State, and exchanging such bonds for a like amount of bonds of the corporation, the State not becoming a stockholder, and taking a collateral security of more or less value—this is the next heaviest item, and amounts to about three millions of dollars; third, by endorsing the bonds to corporation and taking a mortgage on some other collateral security—this amounts to about two millions.*"

It is a part of the judicial history of the State that the counties had been subscribing to the capital stock of rail-

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road companies, and hence the provisions of the constitution (art. II, sec. 14; art. V, secs. 1, 6, 7; art. VII, sec. 7), and of the act of 1869 (Code, secs. 1996 to 2000), which left counties, like the State, at liberty by a general provision of law to protect investments made before 1868, but subject to restrictions similar to those imposed on the State as to incurring other obligations. Did not the citizen need even greater restrictions to protect him against municipal than State legislation?

Galloway *v.* Chatham Railroad Company, 63 N. C., pages 152, 153, 154.

By comparing the citation given above, it will appear that for thirty years the supreme court of the State has been declaring that the law-makers of 1868 intended to restrict the legislation of municipalities as well as the General Assembly, so that neither could lend its credit without the approval of the voters interested, except to finish a railroad in which it had invested before April 24, 1878.

THE ORDINANCE OF 1868 DID NOT PLACE WILKES AND FORSYTH IN THE SAME CATEGORY.

Though the Supreme Court had, in Wilkes County Commissioners *v.* Coler, 180 U. S., at page 532, mentioned the act of 1879 as a statute "*which has been adjudged never to have become a law of the State*," drawing the deduction that such a law could confer by a power which its direct provisions were ineffectual to grant.

In opening the discussion as to the general authority granted by the ordinance of 1868, Judge Morris, speaking for the majority of the court, said:

"The question now to be passed upon, therefore, is whether, independent of the invalid legislative *enactment attempted to be passed subsequent to the convention ordinance of March 9, 1868, Wilkes county had the power under the ordinance to submit the stock subscription to the vote of the qualified voters, and upon authorization by a majority of the votes to issue the bonds and levy taxes to pay the interest and principal.* If Wilkes county was in the same category with Forsyth county, the supreme court of North Carolina adjudged in the case of Belo *v.* Commissioners, 76 N. C., 489 (1877), that the power was conferred by the ordinance of the convention, and this ruling remained unaffected by any subsequent adjudication of the supreme court of North Carolina, and until these bonds were issued."

The argument of the court to which we have adverted shows that "*the invalid legislative enactment attempted to be passed subsequent to the convention ordinance of March 9th*, 1868," seems to have been an afterthought, as in the foregoing extract it seemed to be justly conceded that the act of 1879 was not a law that could confer any authority on the county of Wilkes.

The first section of the ordinance of 1868 made "*Salem and Winston, in Forsyth county,*" *the only fixed and certain point on the proposed road, and Forsyth county* was the only county through which the ordinance required the proposed road to be built (Record, page 10).

Section 13 provided that the company should have power to construct branches of said road, one of which shall run from the towns of Winston-Salem, by way of Mount Airy in Surry county, to line of the State of Virginia (Record, page 13).

Leaving out of view the "legislative enactment attempted to be

passed"—the act of 1879—*Wilkes county was left by the charter in the same category, not with Forsyth (in which the initial point of the main line is located by the charter), but with every county in the State other than Forsyth.*

If the charter conferred this authority on Wilkes county, it would follow that the company might have projected branches from any point in the main line—for instance, Greensboro, or Winston-Salem, or any intermediate point thereon—to any point of the Atlantic coast, or on the borders of either Virginia, Tennessee, or South Carolina; and by virtue of locating such line the act of the company, not of the legislature, would vest authority not only in every county "*through which*," but in every county "near which" such line would pass.

The supreme court of North Carolina had, by a line of decisions running back for about a century before the bonds were issued, held that the word "near" was too indefinite to fix and determine location. Applying the principle that the court had adjudged that a call for a stake, an indefinite point, in a known line, by a certain course, should be extended beyond the distance given so as to intersect with such line, while if the same call had been for a stake "*near*" such line, it should not be run or extended beyond the distance called for, because the word "*near*" designated no particular point.

Cansler *v.* Fife, 50 N. C. (5th Jones), 424, 427.
Mizzell *v.* Simmons, 79 N. C., 182.

In Cansler *v.* Fife (50 N. C., at pages 427, 428) the court said:

"In respect to the question as to Rickman's line, we also

concur with his honor. There was no evidence by which the jury could locate that line; supposing it to have been located, *the call for a Spanish oak, in or near* Rickman's line, *would not control course and distance*, because the Spanish oak could not be found, *and the word 'near' is not sufficiently certain. How near? One pole or fifty? Either would satisfy the term 'near.'*

Harvy *v.* Goodman, 1 Dev. and Bat. Rep., 76."

In attempting to show that the line, *which is called a branch in the void act of 1879*, is built as the second division, leaving out of view said void act, the court (at page 116 of the record) said:

"The piece of railroad for which the bonds in suit were issued does run from Salem and Winston, in the general direction of the northwestern boundary line of the State, and, indeed, *it seems evident that such a railroad, to some point in the northwestern boundary line of the State, must pass near or through Wilkes county.*"

Construing the ordinance "*alone*," the court, in order to sustain the validity of the bonds, was driven to the necessity of holding as a matter of judicial knowledge that a line through an adjacent county to Wilkes would be within the meaning of the ordinance (the charter) near to Wilkes county. "How near; one mile or fifty?" (50 N. C., page 428). Yet the law of North Carolina, before 1868, in October, 1889, was that a jury must be instructed that the word "near" was too indefinite to determine location. Yet the court, in Wilkes County Commissioners *v.* Coler, 180, 506, 531, said:

"It is settled doctrine of this court 'that the question arising in a suit in a Federal court of the power of municipal corporations to make municipal securities,' is *to be determined*

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by the law, as judicially declared by the highest court of the State, when the securities were issued, and that the rights and obligations of the parties accruing under such a state of the law, would not be affected by a different course of judicial decision subsequently rendered any more than by subsequent legislation."

"*When the securities were issued*" (*in October, 1889*) "the law of the State, as judicially declared by the highest court of the State" for a century, was that the word "near" was too indefinite, as a descriptive term, to fix and determine location, and consequently that the court could not say judicially, nor allow a jury to determine, that near a county means in an adjacent county or in a county between which and Wilkes there was only one county intervening.

Apparently doubting whether the position that the charter route must pass near Wilkes county in order to reach the North Carolina boundary line of the State, and that, therefore, the charter would clothe Wilkes county with authority as a county near the proposed line, the circuit court of appeals, in the same paragraph, fell back upon the position that "the invalid legislative enactment attempted to be passed"—"the act of February 20, 1879, which is recited in the bonds as authority for issuing them, definitely located the road running into Wilkes county." In explanation the court said further (Record, page 116):

"It does it by enacting, that section 13, of the convention ordinance, shall be amended by adding certain words, which make it read when so amended as follows:

"So far as now appears, the amendment locating the road into Wilkes county, was validly passed and became a valid law of North Carolina."

If the last paragraph means that section 4 (page 15 of the record) is valid, then it overruled the supreme court and contradicted its own statement in a previous paragraph that the attempted legislation was void.

If the court intended to rest its ruling upon the authority of the ordinance alone, it was inconsistent and illogical to fall back upon the later act.

If the court meant to assert the position that the authority was conferred by the act of 1879 as an amendment, then that act would be valid as a grant of power by virtue of the amendment to the charter in section 2, but void as a grant of power by virtue of section 4.

The constitution (art. II, sec. 14) provides that "No law shall be passed * * * to pledge the faith of the State, *directly or indirectly*, for the payment of any debt, or to impose any tax upon the people of the State, *or to allow the counties, cities or towns to do so*, unless the bill for the purpose," etc.

How, in the face of this prohibition, could Wilkes county be vested by the act of 1879 with authority which had not been previously granted, if that act was "no law"?

The circuit court of appeals sought to correct the supposed mistake of the supreme court in Wilkes County Commissioners *v.* Coler, in declaring that the act of 1879 had never become a law of the State for any purpose, by holding that the legislation had indirectly authorized a county to pledge its faith, though that section of the constitution (it would seem needlessly) provided that such pledges should be made, neither directly nor indirectly.

The petitioners have attempted only to show errors in the leading opinion of the court, and have not alluded to numerous errors of law and mistakes of fact which they think are contained in the concurring opinion, hoping to do this upon a final argument of the cause.

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